BEFORE THE HEARING COMMISSIONERS
FOR THE INVERCARGILL CITY COUNCIL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application for resource consent to demolish, alter and redevelop land and buildings on the Central Business District
BY	**HWCP MANAGEMENT LIMITED**
	Applicant

SUBMISSIONS ON BEHALF OF H & J SMITH HOLDINGS LIMITED

Dated: 27 March 2019

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MAY IT PLEASE THE COMMISSIONERS:

1. These submissions are filed in support of a submission which has been filed by H & J Smith Holdings Limited ("**H & J's**").

2. H & J's is a family owned retailer and property owner which forms part of an interrelated group of companies. It has traded from its own premises in its current location on the corner of Esk, Kelvin and Tay Street since 1913, after starting on Dee Street in 1900. H & J's has other retail and property interests in Invercargill, Dunedin Balclutha, Gore and Queenstown.

3. From the outset I wish to confirm what was stated in H & J's submission in response to the notified application and which will be confirmed in evidence called before you today, that H & J's is generally very supportive of the concept of the redevelopment proposed in the application and accepts that if the development is as successful as the applicant predicts that such will have significant positive amenity impacts on the CBD of Invercargill, and should also have positive economic impacts for the city and in particular property owners and retailers located within the CBD in the longer term. In a nutshell H &J's concern is how "long term" it might be before those positive impacts are experienced and what will be the damage to neighbouring retailers in the interim.

4. Other concerns H& J's has relates to effects on amenity of the CBD and Health and safety issues during the period of construction and the lack of weather protected connectivity between the proposed development and neighbouring retailers, especially with a bookend large retailer such as H & J's. It would appear that no thought was given to such (and the Policies of the District Plan which promote such) during the design phase and when H & J's had an opportunity to raise such concerns, they were told it was effectively too late as the final design prevented such.

5. Contrary to my friend Ms Hamm's opening submission, H & J's does not appear before you today as a Trade Competitor. In fact, for very obvious reasons as Invercargill's largest CBD retailer, it welcomes the redevelopment and the prospect that another large anchor tenant (who may be a direct competitor) and the significant provision for public carparking will have in assisting attracting customers back into the CBD. For the record, even if H & J's was deemed to be a Trade

Competitor, it would pursuant to section 308B of the Resource Management Act 1991 ("**Act**") be entitled to make a submission as even the applicant has accepted that those property owners and retailers that neighbour the development will be directly affected by the effects of the proposed demolition and redevelopment on the environment in which they are located.

6. Further, it is wrong for Ms Hamm to suggest as she does at para 44(c) of her opening submissions that "….H & J Smiths is in great decline well before any CBD action from HWCP". Clearly Ms Hamm has had difficulty interpreting Ms Hampson's evidence and both she and Mr Smith can clarify the evidence should you have had a similar difficulty.

7. H & J's concerns with the proposal are that it is concerned that the temporary adverse effects of the proposal on the environment in which it is located will be significant and definitely more than minor. In fact, it is noted that Ms Hamm confirms what is noted in the applicant's Assessment of Environmental Effects that such effects are likely to be "significant", are "unavoidable given the scale of the project" and are a "major concern to a number of submitters".

8. What has been difficult for neighbouring property owners and retailers is that they are caught between a rock and a hard place. The significant decanting of tenants from the premises to be demolished and redeveloped which has already occurred before and since the redevelopment has been announced is already having an adverse effect on the amenity of the CBD. To that end, neighbouring property owners and tenants are anxious to see the redevelopment occur sooner rather than later.

9. The real concern for H & J's (and clearly others) is there is no certainty as to when the project will get underway or how long it might take to have a fully tenanted redevelopment. H & J's acknowledges the evidence before you as to the best case scenario as to the time periods but also notes there is no evidence before you as to confirmed financing from the joint venture applicant or in fact confirmed tenants. Given such, how confident can you be that the developer will commence demolition within a few months, proceed to construct new buildings without confirmed tenancies, or indeed what the effects of the redevelopment might be even if they do proceed as we may be left with a redeveloped precinct with a lack of tenants.

What impact might that then have in terms of the amenity of the CBD let alone the predictions as to the longer term predicted economic benefits.

10. What is certain (and again acknowledged by the applicant) is that with the best will in the world there are going to be significant adverse effects on the CBD during the period of demolition and reconstruction. What the applicant has done is simply acknowledge such without making any attempt to quantify such let alone seek to offer anything in terms of mitigation of effects such as the economic effect on retailers who will suffer such.

11. In considering and assessing these concerns we all have to appreciate that the scale of this development makes it unique. Again, this is acknowledged by the applicant. I would put to you there are no examples in New Zealand (other than possibly Christchurch following the recent earthquakes) where a total CBD block or precinct of this size has been proposed to be predominantly demolished and redeveloped. Adding to the complexity is the existence of a number of heritage buildings some of which are to in part be preserved, issues such as asbestos removal and general Health and Safety issues as well as attempting to internalise the effects of significant demolition and rebuilding while neighbouring retailers are expected to continue to trade successfully.

12. Given the scale of what is proposed and the potential uncertainties, particularly given there is no evidence of confirmed tenants, one would have thought a more cautious approach would have been for the development to proceed in defined stages starting possibly with the carpark, with demolition only occurring when previous stages are completed and tenants secured rather than allowing block wide demolition with the prospect, notwithstanding the best intentions in the world, that sites may remain undeveloped and the resultant adverse amenity and flow on effects.

13. Indeed, I would suggest to you it is very unusual for developers to commence development until they have secured tenants. This is evidenced by what has occurred in Christchurch. You simply do not see developments commence until a number of tenants have been secured. If this is accepted, then what is the justification for the block wide demolition to occur in one hit. Again, the potential adverse impacts if the Joint Venture get it wrong are compounded in this unique situation by the sheer scale of the proposed development. It may only be predicted

to take 3 ½ years to complete the first three stages of the redevelopment but there is no evidence to give you any confidence that the redevelopment will be fully or anywhere near fully occupied within that time period.

14. Even without the applicant's acknowledgment that the effects on the environment of the CBD will be significant, Ms Hampson's unchallenged expert economic evidence as to the potential negative impact on at least H & J's is highly relevant to your consideration as to the types of adverse impacts others are likely to suffer.

15. For Ms Hamm to suggest that submitters' expectation that the applicant may have bothered to support its application with some economic evidence of what she suggests will be "substantial "and "unavoidable" adverse effects on neighbouring retailers would be "overkill" is with respect highly disrespectful to such retailers. The applicant has not been hesitant to call expert economic evidence of the likely effects of a completed and fully functioning redevelopment (whenever that might occur). One can only wonder why it chose not to extend such to the period of demolition and redevelopment.

16. In my submission nothing further needs to be said in terms of the first gateway test of section 104D(1) of the Act. Clearly the application does not pass the same.

17. Mr Vivian's evidence confirms that the application also fails the second gateway namely that the proposal is contrary to at least some of the Objectives and Policies of the Invercargill Proposed District Plan ("**PDP**").

18. I have not analysed in any depth the Objectives and Policies which relate to Heritage as effects on heritage are not of any particular concern to my client other than to the extent the proposal might be contrary to the relevant Objectives and Policies. It is noted that the relevant Heritage Objectives and Policies in the PDP clearly have an emphasis on protection and retention of heritage items (see Objective 4, Policy 15(A) and 22).

19. Clearly Ms Hamm's assessment of the relevant Heritage Objectives and Policies at paragraph 22 is fundamentally flawed. In particular, the Policy she refers to (noting it does not appear to be Policy 3 as noted by her) addresses the effects of subdivision, use and development **on** heritage. Rightly or wrongly in this case by the time the demolition is complete, the majority of the heritage will have

disappeared. Whilst there is support for the proposal from Historic Places, they do not call any evidence as to whether what is proposed is contrary to the Heritage Objectives and Policies.

20. As my friend Ms Hamm notes at para 31 of her submissions, Policy 1 of the Business 1 Zone (Central Business District) is to retain existing **and** encourage new commercial /retail activities in the Central Business District [emphasis mine]. A very simple assessment of this application demonstrates that this proposal does not retain any commercial and retail activities other than businesses which are not within the control of the applicant, namely the Kelvin Hotel (and its retail offering) and the Reading Cinema Complex. Indeed, it can be said that the mere notification of the intention to undertake this development has led to significant decanting of tenants from the application sites.

21. Whilst she does not address the second gateway test of s 104D(1) in anywhere near the detail one would expect, Ms Hamm submissions at least imply that the provisions of other documents can and should be considered in your assessment of such. From the very wording of s 104D(1)(b) this is clearly legally incorrect. The only documents relevant to such assessment are the Objectives and Policies of the District and Regional Plans and it is my submission to you the evidence before you show that the proposal is contrary to the same.

22. In my submission in addition to the Heritage Objectives and Policies the proposal is clearly contrary to Objective 3 and 5 and Policies 1, 3(D) & (G), 1016(B) and 20 of the Business 1 (CBD) Zone of the PDP.

23. I submit that in order to pass the second gateway under s 104D(1) the proposal cannot be contrary to **any** of the Objectives and Policies of an Operative or Proposed Plan. The High Court in *Queenstown Central Limited v QLDC*[1] confirmed the proper application of s 104D(1)(b) and held it is not appropriate to make an overall judgment of a proposal and whether it is contrary to the Objectives and Policies of the relevant Plans, taken as a whole. The proper test under s 104D(1)(b) is a tougher one; if the activity is contrary to any Objectives or Policies, it cannot pass through the gateway. Fogarty J noted that Parliament did not intent for s 104D(1)(b) to be used for "finessing out qualifiers of one objective by looking at

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1 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 at [37]-[40].

another objective, to reach some overall conclusion that viewed "as a whole" the objectives allowed… retail activity of this size."

24. Given the above it is my submission that the proposal fails to meet the threshold tests of section 104D (1) and you therefore have no ability to consider it further and exercise any discretion to approve the same. The failure to meet either of the threshold tests is fatal to the application.

25. If my submission in this regard is not accepted then I agree with Ms Hamm that if, having heard the evidence and submissions, you were mindful to consider granting consent, then due to the incoherent set of Policies set out in the District Plan that you need to have regard to the provisions of Part 2 of the Act. In terms of the same the following are relevant:

Section 5 – managing the use, development and protection of physical resources in a way or at a rate which enables people and communities to provide for their social and economic wellbeing and for their health and safety while –

….

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment;

Section 6(e) – the protection of historic heritage from inappropriate subdivision, use and development;

Section 7 – In achieving the purposes of the Act all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall have particular regard to –

(a) …

(b) The efficient use and development of physical and natural resources;

(c) The maintenance and enhancement of amenity values;

….

(f) Maintenance and enhancement of the quality of the environment.

26. Further, if you are mindful of granting consent then given the scale and unique nature of the development as well as the lengthy period of demolition and construction (at the very least 3 ½ years) all of which will on the applicant's own admission result in significant impacts, that conditions of consent relating to the

preparation of Management Plans to control and minimise such adverse effects (to the extent that is possible) should involve representatives of neighbouring property owners and retailers in the preparation and finalisation of the same.

27. For the same reasons I submit it is reasonable for there to be a significant cash bond to incentivise the completion of the development within a reasonable period, so the neighbouring property owners and retailers are not left dealing with adverse effects long term. The bond could be expended in landscaping or otherwise improving the amenity of any sites left vacant over a long period.

28. I also believe there is justification given the Council's role in the Joint Venture for any certification of conditions to be undertaken independently of someone in Council. Contrary to Ms Hamm's submissions such person would not have to hold any form of Warrant as their role would not involve enforcement, just certification.

29. Again, my client regrets that it has had to make this submission. Might I suggest a development of this nature and scale and one which will take such period of time should have been promoted on the basis of a Plan Change rather than a non-complying resource consent which always had the potential of failing to pass the hurdle of section 104D of the Act.

G M Todd
Counsel for H & J Smith Holdings Limited

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000514
[2013] NZHC 817

BETWEEN	QUEENSTOWN CENTRAL LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
AND	CROSS ROADS PROPERTIES LIMITED Applicant
AND	FOODSTUFFS (SOUTH ISLAND) LIMITED Applicant in CIV-2012-000405

CIV-2012-425-000515

AND BETWEEN	QUEENSTOWN LAKES DISTRICT COUNCIL Appellant/Respondent
AND	CROSS ROADS PROPERTIES LIMITED Applicant
AND	FOODSTUFFS (SOUTH ISLAND) LIMITED Applicant in CIV-2012-425-000405
AND	SHOTOVER PARK LIMITED Objector

Hearing: 12-14 February 2013
(Heard at Queenstown)

Appearances: G Todd for the Appellant
J Gardner-Hopkins and E Matheson for First Respondent
T Ray and J MacDonald for Queenstown Lakes District Council

Judgment: 19 April 2013

RESERVED JUDGMENT OF FOGARTY J

Table of Contents

Introduction

[1] These are two appeals. One is by Queenstown Central Limited (QCL), which owns property on the Frankton Flats. The other is by the Queenstown Lakes District Council (QLDC). Both are against one decision of the Environment Court granting consent to Cross Roads Properties Limited's proposal for a Mitre 10 Mega on the Frankton Flats, which is the subject of plan change 19. I call that the *Cross Roads* decision.[1] That decision was released shortly after the *Foodstuffs* decision.[2]

[2] This judgment needs to be read after reading this Court's decision allowing the appeal against the *Foodstuffs* judgment.[3] While some overlap is unavoidable, so far as possible the goal in this decision is to address all the issues in the Mitre 10 Mega appeal without duplicating the reasoning from the *Foodstuffs* decision.

Errors applying s 104D(1)(a) of the Resource Management Act 1991

[3] Applying s 104D(1)(a), the Environment Court in *Cross Roads*, by a majority, was satisfied that there is only a minor adverse effect, by reason of the reduction in supply of industrial zoned land should this proposal go ahead. It found that:

> [59] ... adopting the analysis in *Foodstuffs*, as a matter of law the supply of possible industrially zoned land under proposed PC19(DV) is not part of the (future) environment for the purposes of section 104D.

[4] As in *Foodstuffs*, in the alternative, putting aside *Queenstown Lakes District Council v Hawthorn Estate Ltd*, [4] the Court went on to consider whether the removal of 1.8 hectares of industrial land would only be minor or

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1 *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177 at [59] (*Cross Roads*).
2 *Foodstuffs (SI) Ltd v Queenstown Lakes District Council* [2012] NZEnvB5.
3 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.
4 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

not. This analysis was done with close attention to the distinctions between the E1 and E2 provisions of PC19. The majority of the Court was: [5]

> [61] ...satisfied that, even when added to the *Foodstuffs* effect on industrial land supply, overall the adverse "effect" of [Cross Roads Properties Limited's] proposal on the industrial land supply in the PC19(DV) "environment" is only minor.

[5] Part of the reasoning included taking into account the flow-on implications of the Canterbury earthquakes and the ongoing global financial crisis, and supporting an expert opinion that the growth path of the Queenstown Lakes District is likely to be more subdued than the projections of the QLDC. The Environment Court concluded:[6]

> [65] ...Taking all those matters into account, we are satisfied that to lose 5% (cumulatively up to 5.6%) of the only land that is proposed by PC19(DV) to be protected for "true" industrial uses would be an effect on the PC19(DV) environment that is only minor.

[6] This s 104D(1)(a) reasoning is much shorter than that in *Foodstuffs*. But it is obviously following the two alternatives, with *Hawthorn* and without, and in the latter using the numeric test.

[7] It is clear that the same errors of law in the application of s 104D(1)(a) in *Foodstuffs* are manifest in this judgment.

Alleged errors of law interpreting PC19(DV)

[8] The errors by the Environment Court applying s 104D are sufficient to dispose of the appeal. I deal briefly with the other alleged errors of law. The Queenstown Lakes District Council appeal and the Queenstown Central Limited appeal both argued that the Environment Court erred in its interpretation of objective 10 PC19(DV). As I have already indicated, I deal with this briefly because this document has now been rendered obsolete by the decision of Judge Borthwick's division of the Environment Court on 12 February. In *Foodstuffs*, it is not clear there whether or not the Environment

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5 *Cross Roads* at [61].
6 At [65].

Court was deliberately using its analysis of objective 10 to cover both s 104 analysis and s 104D(1)(b) – but postponing that judgment to very end.[7] It is not clear again in *Cross Roads*. I deal with the issues as to whether there is any error of interpretation of PC19 briefly, in case these appeals go to the Court of Appeal, and there this section of alleged errors of law become relevant.

[9] After its s 104D(1)(a) analysis, the Environment Court then proceeded on a s 104 analysis, examining the proposal against the relevant objectives and policies of the operative district plan and PC19(DV).

[10] In these two appeals, I heard argument that the Environment Court incorrectly interpreted the objectives and policies of PC19(DV). The argument was that the Environment Court underweighted the industrial activity goals of PC19(DV). This argument went both to errors of law in s 104 analysis, and s 104D.

Whether there was an error of law when interpreting objective 10 of PC19(DV)

[11] The reader will recall that both the Pak'nSave and Mitre 10 Mega proposals were located in Activity Areas E1 and E2. These areas were the subject of objectives 9 and 10. Objective 10 seeks:

> ***To create additional zoning for light industry and related business activity within the Frankton Flats Special Zone (B) (Activity Areas E1 and E2)***
>
> *(emphasis added)*

[12] As we shall see, the key, or core interpretation issue as to the scope of objective 10 is the function of the qualifier "related" in the phrase "and related business activity". The obvious argument is that objective 10 is to create additional zoning for light industry (as the principal objective) and "related business activity" that is related to light industry. Such a

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[7] See [119] of *Foodstuffs*, set out below.

construction is going to be inimical to the provision of a supermarket, but less so in the case of a Mitre 10 Mega, depending on the view taken as to the character of the Mitre 10 Mega store.

[13] The key sub policies under objective 10, which were contentious between the parties, were identified by the Environment Court as 10.1, 10.5, 10.6 and 10.11. They are:

> ***Policies***
>
> *10.1 To enable predominantly industrial and trade service activities within Activity Area E1;*
>
> ...
>
> *10.5 To exclude activities (such as residential activities, non showroom retail and visitor accommodation) that conflict with the activities of the intended uses in the Zone.*
>
> *10.6 To ensure that the use of industrial and business areas is maximised by ensuring adequate minimum lot sizes and building design to allow for future adaptive reuse.*
>
> ...
>
> *10.11 To ensure land is used for its intended purpose, any office space and/or retail in Activity Area E1 must be minimal and ancillary to the principal use of the site.*

[14] Because the *Cross Roads* analysis followed after *Foodstuffs*, I summarise first the Environment Court's PC19(DV) analysis in *Foodstuffs*.

Summary of Environment Court reasoning on objective 10 in Foodstuffs

[15] The Environment Court in *Foodstuffs* considered it did not have to consider s 104D(1)(b), that is whether the proposal is contrary to the objectives and policies of the proposed change. But it then said: [8]

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[8] *Foodstuffs (SI) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 at [119] (*Foodstuffs*).

> [119] ... However, out of an abundance of caution... we will consider each of the objectives and policies to which the proposal by Foodstuffs is said to be contrary, after we have discussed them below under section 104(1)(b) of the Act.

[16] The Environment Court did not make a clear finding that the application will not be contrary to the objectives and policies of the proposed plan (ie, apply s 104D(1)(b). It did respond to arguments that the proposals were in conflict, by saying that it "is fundamental that the plan change be read as a whole".[9] It did reach these conclusions:

> [233] Looking at PC19(DV) as a whole, we find it also includes references to:
>
> - "includ[ing] business ... areas ...;
> - "... a wide range of urban activities [to] be accommodated within the Zone";
> - "... provid[ing] a suitable range of local ... business activities"
> - Show-room retail as a limited discretionary activity and retail as a discretionary activity.
>
> Taking these provisions together with the multiple references to business activities in the policies for objectives 9 and 10, we consider those objectives cannot be read as excluding business from the E2 subzone, and that business includes some retail (for example retail which is inappropriate in the C1 subzone).
>
> ...
>
> [237] Even if we are wrong about how proposed objective 10 and its policies are to be read, the effect of the proposal on them is at the lower end of minor, as we found in part 3 of this decision. So while there would be a social loss because of the reduction in industrial land supply, that loss is small.
>
> [238] Finally, we judge that the impact of not using for industrial activity the small section of the site which is in the Activity Area E1 is *de minimis* in terms of policies 10.1 and 10.11.

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9 At [232].

Summary of Environment Court reasoning in Cross Roads

[17] As in *Foodstuffs* the Environment Court declined to read PC19(DV) too closely, but took the approach that the plan change should be read as a whole.[10] It found that the overarching objective 2 contains a policy that the zone should contain a suitable range of local service and business activities,[11] and it found that there was a conflict between Policy 10.11 and Policy 10.1, and that it was difficult to reconcile policy 10.11 with policy 10.5.[12] It found:

> [153] In summary, objective 10 is unclear in the PC19(DV), and its policies not nearly as consistent or coherent as they should be. Given that rather unsatisfactory state of affairs, we conclude that while the proposal is contrary to policy 10.11... that policy is not consistent with policies 10.1 and 10.5... Overall we hold that, bearing in mind that "contrary to" is a strong phrase, the CRPL is not repugnant to objective 10 or its policies, read as a whole. Indeed, because the CRPL proposal is for predominantly trade show-room retail and has elements of trade services also, we find that on balance, the proposal is, as a business activity, likely to implement the other policies for the objective, more than it may "fail" policy 10.11. Finally, we can give the rules little weight in this state of policy confusion.

[18] After consideration of other matters, including Part 2, the Environment Court went on to grant the consent.

[19] Commissioner Fletcher dissented not only on whether or not the proposal could get through the gateway, but saying:

> [201] ...In my view not only is the loss of future industrial land an effect in terms of section 104(1)(a) [13] that is more than minor, but there is more to the issue. The proposal not only does not give effect to, but is contrary to objective 10, and specifically policies 10.1 and 10.11 of PC19(DV). I would refuse consent under PC19(DV).

That appears to be an application of both limbs of s 104D.

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10 *Cross Roads* at {148].
11 Ibid.
12 At [150].
13 Clearly a typographical error in context; he was referring to s 104D(1)(a).

Analysis of the Environment Court's interpretation of objective 10

[20] It is important to pause here and note the difference between the standards in this respect, under s 104D and under s 104. Under s 104D(1)(b), the consent authority must be satisfied that the proposed activity will not be contrary to the objectives and policies of the relevant proposed plan.[14] It also has to be satisfied it will not be contrary to the objectives and policies of the operative plan, particularly objective 6,[15] and policies 6.1 and 6.2. The discretion reserved under s 104 enables consents to be granted, even if they will be contrary to aspects of a proposed plan, be they objectives, policies, or rules, or zones, or other rules of implementation.

[21] It was an error of law to do the s 104 analysis before doing the s 104D(1)(b) analysis. When applying regulatory law it is important to ask the right question at the right time. Section 104D is commonly known as a gateway decision. That is how it was described by the Court of Appeal in *Dye v Auckland Regional Council*:[16]

> [5] As Mr Dye's application was for consent to a non-complying activity, it had to pass through one or other of the gateways referred to in paras (a) and (b) of s 105(2A) of the Resource Management Act 1991 (the Act). If neither gateway was satisfied the application would fail. If the application passed through either gateway Mr Dye then had to satisfy the consent authority that the application should be granted, bearing in mind the matters referred to in s 104(1) and in terms of the overall discretion inherent in s 105(1)(c) of the Act.

[22] There are a number of objectives in PC19(DV). The argument focussed on objective 10. It also focussed on logic of the Environment Court, which argued that all the objectives should be read as a whole before drawing a conclusion as to whether proposals were contrary to the objectives.

[23] This part of the Environment Court's reasoning was defended more by Mr Todd, counsel for Cross Roads Properties, than by Mr Soper for Foodstuffs. It was not a ground of appeal under the *Foodstuffs* judgment.

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14 Section 104D(1)(b)(ii).
15 Section 104D(1)(b)(i) and (iii).
16 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).

[24] Under the ordinary rules of interpreting legal instruments, one is entitled to take into account the factual context before reading any plan change, or for statutory instruments, the "mischief" being remedied.

[25] When interpreting objective 10, it is important to keep in mind the indisputable context that there is a shortage of industrial land in Queenstown. The Environment Court accepted that. The only issue being, how big was the shortage? In both *Foodstuffs* and *Cross Roads,* the Environment Court also accepted that whatever the shortage was there was not enough undeveloped land in Queenstown suitable for industrial use which could meet that demand. It was also common ground that, on any view of it, PC19 was endeavouring to put into the Frankton Flats (B) area a combination of residential, retail, commercial, and industrial uses. It was never going to be possible to simply say that because the zone envisaged some retail uses, therefore one could be satisfied, if this was a retail use, it would not be contrary to the objectives. Plainly, the zone had to accommodate all forms of uses, including industrial uses. The fact that the E2 zone allowed some retail did not mean that the objectives of PC19(DV), to provide for industrial activity, were not being pursued in that zone.

[26] The second basic context, which is a given, for resource management planners and for an expert Court such as the Environment Court, is to understand that there are always neighbourhood adverse effects that have to be brought into account when fitting industrial activities into an urban environment. Typically, to avoid nuisance, industrial activities are kept separate from residential activities, whereas retail activities are kept proximate to residential neighbourhoods, by foot or by car. It is also well-known that big box retail is a phenomenon which now has to be accommodated, and which poses serious challenges. Part of the context is that the QLDC had provided for a big box retail zone in the Remarkables Park area nearby.

[27] These armchair considerations are to some degree reflected in the opening paragraphs of PC19(DV), which include these passages:

12.19 Frankton Flats Special Zone (B)

12.19.1 Resources and Values

...This Zone is a large greenfields development site consisting of approximately 69 hectares located within close proximity to Queenstown's existing developed urban area...

12.19.2 Resource Management Issues

...

ii **Sustainable Development**

The primary goal of the Frankton Flats Special Zone (B) is to enhance the sustainable development of Queenstown. It is one of the few areas left with the capacity to contribute significantly toward the need for affordable housing at densities not hitherto achieved in the District...

iii **High Quality Urban Environment**

In keeping with the primary goal of sustainability, development must create a liveable community characterised by high quality urban design to include:[17]

(a) compact residential neighbourhoods containing a mix of housing types and sizes, adequate open space, affordable housing and ready access to public transportation

(a) commercial districts with shops for residents and visitors

(b) business and industrial areas to provide employment for locals

(c) educational facilities

(d) a range of visitor accommodation facilities that add to the life of the community but do not intrude into residential neighbourhoods.

Explanation

The creation of a mixed use zone requires appropriate design of buildings and the space between buildings to create cohesion within the development. The overall urban design within zone is very important and should be given priority when developing within this zone.

(Emphasis added)

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[17] There are two bullet points labelled (a) in the original document.

[28] Pausing here, both the s 104D(1)(b) test, and s 104 require an examination of whether the insertion of Pak'nSave and Mitre 10 Mega big box retail developments will compromise the goals of achieving compact residential neighbourhoods, commercial districts, and business and industrial areas, educational facilities, and a range of visitor accommodation.

[29] For s 104D(1)(b), the question is not whether some retail activities can be provided for in plan change 19, but whether the scale of the retail activity proposed in E1 and E2 can be provided consistent with the industrial objectives.

[30] The question in s 104 analysis is whether or not the application has sufficient merit to go ahead, even if it is incompatible with either objectives, policies and/or rules. The question in s 104D(1)(b) is whether there can be a gateway satisfaction that the proposal will not compromise any objectives and policies.

[31] Objective 2, Policy 2.1 of PC19(DV) provides:

> *2.1 To ensure that development is undertaken in accordance with a Structure Plan and Outline Development Plans in Activity Areas C1, C2, and E2, so that a wide range of urban activities can be accommodated within the Zone while ensuring that incompatible uses are located so they can function without causing reverse sensitivity issues;*
>
> (Emphasis added)

[32] Objective 8 provides:

> ***To provide an area dedicated to industrial and yard based activities to meet and maintain the economic viability of these activities within the District – Activity Area D***
>
> ***Policies***
>
> ...
>
> *8.5 To exclude retailing of goods unless manufactured on site or directly connected to the industrial use of the site*
>
> ...

[33] The argument before the Court focussed on objective 10. Objective 10 provides:

> ***To create additional zoning for light industry and related business activity within the Frankton Flats Special Zone (B) (Activity Areas E1 and E2)***
>
> ***Policies***
>
> *10.1 To enable predominantly industrial and trade service activities within Activity Area E1;*
>
> *10.2 To enable high quality activities which benefit from visual exposure and passing trade, and which can contribute to a high quality streetscape, to locate along the Eastern Arterial Road within Activity Area E2. These include activities such as retailing inappropriate for location within Activity Areas C1 and C2. These tend to be single purpose destinations offering goods and services associated with vehicles, construction and home building. Showrooms and premier light industrial premises are also anticipated.*
>
> ...
>
> *10.5 To exclude activities (such as residential activities, non showroom retail and visitor accommodation) that conflict with the activities of the intended uses in the Zone.*
>
> ...
>
> *10.11 To ensure land is used for its intended purpose, any office space and/or retail in Activity Area E1 must be minimal and ancillary to the principal use of the site.*

[34] The conflicts with objective 10 between the Pak'nSave proposal and the Mitre 10 Mega proposal differ. This is because the Mitre 10 Mega proposal was located in the industrial zone E1, whereas the Foodstuffs proposal was largely in E2, which was for light industrial activities with some provision for retail. Obviously, the Mitre 10 Mega proposal more squarely confronted the objectives and policies of PC19(DV).

[35] Having heard detailed argument from many counsel, I was left with the clear conclusion that, having regard to the gateway function of s 104D, which calls for decision before the s 104 analysis, no consent authority informed by the purpose of s 104D and applying subsection (1)(b) as intended

could have been satisfied that allowing two big box retail operations to locate in the E1 and E2 zones would not be contrary to at least policies 10.1, 10.2, 10.5 and 10.11.

[36] I have already observed that it was an error of law for the Environment Court to have postponed the s 104D(1)(b) analysis until after doing the s 104 analysis. The postponement overlooks that the question under the s 104 analysis is not actually compliance with the objectives and policies, or the rules. Some non-compliance can be allowed, particularly if overall the project serves the purposes of Part 2 of the Resource Management Act.

[37] In [71] of the *Foodstuffs* decision, already set out in [54] of the High Court decision on *Foodstuffs*, the Environment Court summarised its understanding of s 104D(1)(b) as:

> (3) the second gateway (section 104D(1)(b)) is concerned principally with the adverse effects of a proposal on the future desired environment (even if, in the case of a proposed plan (change) that may be unlikely).

That is not the test, as I have observed in *Foodstuffs*.[18] It is not an overall judgment of some degree of the adverse effects of the proposal. The test is tougher. The activity must not be contrary to any of the objectives or policies.

[38] The qualifier "related" business activity in objective 10 was emphasised before the Environment Court by Mr Gardner-Hopkins.[19] The Environment Court, having noted that submission, reasoned that when PC19(DV) is read as a whole, a different picture emerges, and went to objective 9 (which addresses adverse effects of activities, and emphasises the phrasing "to enhance the industrial and business areas").

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[18] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [30].

[19] *Foodstuffs* at [229].

[39] I remind myself that the Court of Appeal in *Dye* warn against the High Court getting engaged in interpretation issues. That is undoubtedly apposite when the Environment Court is engaged in applying s 104. But the test in s 104D is being satisfied that an activity will not be contrary to the objectives and policies of a proposed plan. In my view, it was not the intention of Parliament that this gateway section should be used for finessing out qualifiers of one objective by looking at another objective, to reach some overall conclusion that viewed "as a whole" the objectives allowed retail activity of this size in the E1 and E2 zones. The Environment Court was obviously sensitive to the qualifier "related to", because in *Foodstuffs* it returns to it again.[20]

> [232] The arguments for the council and QCL were that "business" is either excluded from the E2 subzone or must be of a kind that is "related to" or subservient to industrial activity. Two policies (or parts of a policy) which might support that interpretation are policy 10.2 with its reference to a restricted class of retail in the last sentence of the policy, and the exclusion of "non show-room retail" in policy 10.5. However, we consider that such an interpretation is to read PC19(DV) too closely. It is fundamental that the plan change be read as a whole, and in the context of the rest of the plan: *J Rattray and Sons Limited v Christchurch City Council* (1984) NZPTA 59 at 61 (CA); *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) and [2005] NZRMA 174 at [30], [35].
>
> [233] Looking at PC19(DV) as a whole, we find it also includes references to:
>
> - "includ[ing] business .... areas ... ";
> - " ... a wide range of urban activities [to] be accommodated within the Zone";
> - " ... provid[ing] a suitable range of local ... business activities"
> - show-room retail as a limited discretionary activity and retail as a discretionary activity.
>
> Taking these provisions together with the multiple references to business activities in the policies for objectives 9 and 10, we consider those objectives cannot be read as excluding business from the E2 subzone, and that business includes some retail (for example retail which is inappropriate in the Cl subzone).

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[20] At [232] and [233].

[40] With respect to the Environment Court, I think that that is not permissible interpretation. It is abundantly clear that E1 and E2 were intended to be predominantly industrial areas for light industry, with business activity related thereto.

[41] This Court agrees with Commissioner Fletcher's reasoning and conclusion. The decision of the majority in the *Cross Roads* decision was materially affected by errors of law, when interpreting policy 10 of PC19(DV), both in s 104D and s 104 analysis.

Taking into account the Foodstuffs consent in Cross Roads, s 104D analysis

[42] There was only one additional s 104D issue raised in this appeal. That was against the application by the Environment Court of *Hawthorn*, to take into account that it had granted a consent to the Pak'nSave proposal, which was likely to be implemented. There is no doubt that had that consent not been overturned by this Court's *Foodstuffs* decision, it would likely have been implemented. In the context of the *Cross Roads* decision it was not particularly material to the reasoning of the Environment Court. For I think that the Environment Court would have come to the same conclusion, granting the Cross Roads proposal, whether or not it had granted the Pak'nSave proposal.

Materiality of error

[43] The reasoning under this topic in the Foodstuffs decision applies equally to the *Cross Roads* decision. In respect of the finding of error in the s 104 analysis, similar considerations apply. Section 104 analysis of a non-complying activity has to be based on a correct reading of the proposed change.

Result

[44] The appeals are allowed, for the reason that the decision has material errors of law, as summarised at the beginning of the *Foodstuffs* judgment, and as set out in the reasoning of that judgment, and in this judgment.

[45] The appeals are remitted back to the Environment Court. In case there be any doubt, the application now requires re-evaluation against the current terms of PC19, as they have been amended by the February 2013 decision.

[46] Costs are reserved. If the parties cannot agree costs, I require counsel to circulate draft submissions on costs, not extending beyond five pages each. After that process, file the submissions. I will deal with these submissions on the papers unless there is a request for an oral hearing. Leave to apply in that regard is reserved.

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